

27 February 2020

Aidan Winder-Speed
Regulation Branch
Commerce Commission
Wellington

Public version

By email: regulation.branch@comcom.govt.nz

Dear Aidan

Cross-submission: Consultation on the Treatment of broadcasting [transmission]¹ services revenue in the Telecommunications Development Levy (TDL)

Introduction

1. We have reviewed the submissions on the above consultation, and would like to comment on some of the points raised by others, as set out below.

Broadcasting transmission does not use a PTN

2. We do not agree with the position taken by MediaWorks that "signal broadcasting" is a telecommunications service by means of a PTN (which is contrary to the position taken by a number of other submitters²). MediaWorks makes this point in a number of places in its submission, but it is not justified or explained. MediaWorks also states that "signal distribution" is not part of the PTN as it is not used by the public for telecommunication (since it is not accessible by the public). MediaWorks fails to explain why this reasoning does not also apply to "signal broadcasting".
3. The better analysis on this point is presented in Kordia's submission which explains that transmissions for broadcasting are not provided over a PTN or a component thereof. The Kordia analysis³ supports the analysis in the Sky submission on this point, and is also consistent with the High Court's decision in the *REANNZ* case.⁴
4. To be a "PTN" a network must be used (or intended to be used) by the public for the purpose of telecommunication. In the case of a broadcasting transmission network, the public is the recipient of the signal (ie the content) conveyed by that network, but the public does not *use* that network to convey signals. To suggest otherwise would be artificial and inaccurate. It is the equivalent of saying that a purchaser of a home meal service (like My Food Bag) delivered by courier, uses the

¹ For the reasons explained in Sky's submission of 12 February 2020, we believe that many of the references in the Commission's consultation page to broadcasting services should be to broadcasting *transmission* services (or transmission services for broadcasting). We also think that using the phrase "*broadcasting services revenue*" is confusing and not consistent with the Act (see paragraph 34 of that letter).

² See the submissions from Sky (paragraphs 14 to 25), Kordia (paragraphs 15 to 18), and TVNZ (paragraphs 2, 5 and 9).

³ See paragraphs 15 to 18 of the Kordia submission dated 12 February 2020.

⁴ *REANNZ v NZ Commerce Commission* [2018] NZHC 2724.

courier service for the purpose of delivering food. The accurate description is that the meal service provider (and not the recipient) uses the courier service for the purpose of food delivery.

Broadcasters are not liable persons

5. For similar reasons to those stated above, we submit that MediaWorks' statement that MediaWorks and other broadcasters will be "liable persons"⁵ is not sound. MediaWorks have not explained why they reach this conclusion. It seems to follow from the unexplained position that "signal broadcasting" is via a PTN. We note that, as MediaWorks benefit from the exception in s85A(1)(a), they may not have focused closely on the criteria for being a "liable person".

Broadcasters already pay the broadcasting levy on broadcasting revenue

6. MediaWorks' submission makes a good point in referencing the fact that broadcasting revenue is already subject to the broadcasting levy payable under section 30A to 30C of the Broadcasting Act 1989. The process for calculating that levy has been established by the Broadcasting Standards Authority (**BSA**).
7. The levy return form used by the BSA is included in Attachment A and does not allow any deduction for "telecommunication revenue". We do not believe that Parliament intended for broadcasting revenue to be subject to the levy under the Broadcasting Act, and for some (unknown) portion of that revenue to somehow, artificially or arbitrarily, be treated as revenue from providing a telecommunications service for the purpose of the "qualified revenue" definition.
8. That would amount to a double levy on the same revenue for different purposes, which does not make regulatory sense and cannot be justified.
9. As indicated in our submission (para 14 and Attachment F) the purpose of the Amendment Act (in terms of impact on the broadcasting sector) was not to make broadcasting revenue subject to the TD (rather it was to avoid anomalies in the future because of the way that technological change is breaking down the boundaries between providers of broadcasting and telecommunication services⁶).

Section 85A is an exclusion – it does not say what the Act covers

10. A number of submissions from the free-to-air broadcasters⁷ naturally focus on the exception provided in s85A(1)(a).
11. This is understandable, but we think it is a mistake to use the exceptions in s85A to incorrectly influence the proper interpretation of "qualified revenue" and "liable person".
12. In particular, the fact that s85A refers to "*revenue that is received... .. in relation to [a/any] broadcasting service*" does not, and cannot, mean that broadcasting revenue is part of "qualified revenue". Section s85A was introduced into the Bill only when reported back from the committee of the whole House on 30 October 2018⁸, while the change to the definition of "telecommunication" had been made over 5 months earlier when the Bill was reported from the Select Committee (see Attachment B).

⁵ See the response to question 15 in the MediaWorks' submission.

⁶ See para 17 of the Kordia submission and the material referenced in footnotes 9 to 11 of the Sky submission.

⁷ See the submissions from MediaWorks, NZME and TVNZ.

⁸ Section 85A was introduced by a Supplementary Order Paper dated 16 October 2018.

13. This indicates that the principal change (in terms of the impact on the broadcasting sector) was to change the definition of "telecommunication" to avoid future anomalies in relation to the general application of the Act, and that the much later addition of s85A was an after-thought to protect against the potential capture of free-to-air broadcasters by the TDL regime. Presumably this was as a result of lobbying by the free-to-air broadcasters who had supported the inclusion of Kordia's transmission services⁹, but who clearly wanted to avoid any suggestion or possibility that the TDL regime might apply to their revenue.

14. The reality is that section 85A is an unnecessarily wide exclusion based either on:

- (a) an abundance of caution (i.e. to ensure free to air broadcasters were not prejudiced by the change to the definition of "telecommunication" which they had supported); or
- (b) a misunderstanding about the scope of change made to the definition of "telecommunication".

This misunderstanding is evident if you compare the wider (and inaccurate) description of that change in the Supplementary Order Paper ("SOP") which introduces s85A ("*a change made at select committee to include broadcasting within the definition of telecommunications*"; underlining added), to the narrow (and more accurate) description of that change by the Select Committee responsible for making it ("*We recommend inserting clause 4(6) to replace the definition of "telecommunication" in section 5 of the Act with a new definition that includes broadcasting transmission services*"; underlining added). See Attachment C for fuller extracts from the SOP and the Select Committee report.

15. To put this more plainly, the purpose of s85A is not to *include* anything within the TDL regime, but only to make clear that certain things were *excluded*. While s85A expressly excludes certain revenue for certainty; it may be that the revenue excluded was never caught by the TDL regime in the first place, either because:

- (a) a broadcaster is not a liable person (since broadcasting does not use a PTN); and/or
- (b) the revenue of a broadcaster cannot be qualifying revenue (since it is not "*revenue... from supplying... ..telecommunication services by means of*" any PTN).

This express exclusion cannot mean that revenue never caught in the TDL regime is now caught.

Confusion and unnecessary regulatory burden – clarity is needed

16. The submissions made on this consultation show that there is a significant level of confusion, concern and uncertainty about the application of the TDL regime to the broadcasting sector. Any attempt to capture "broadcasting revenue" under the TDL regime:

- (a) is unnecessary to meet the purpose of the Act (and the Amending Act)¹⁰;

⁹ See paragraph 3 (and related footnotes) of the Sky submission.

¹⁰ The purpose of the change to the definition of "telecommunication" in the Amending Act was to avoid *potential* future anomalies in the application of the Act given technological change is breaking down the boundaries between providers of broadcasting and telecommunications services (see Attachment C for the relevant extract from the Select Committee's report that introduced and commented on that change). There was no intent or desire to make broadcasters subject to the TDL (the only reference to an impact on the TDL is this single sentence in the Section Committee report: "*We note that some entities may be required to contribute industry levies as a result of this change to the definition.*" That sentence does not refer to broadcasters and only acknowledges a *possible* change to those who contribute. The fact is that, on a proper analysis, there should be no change to who contributes to the TDL.

- (b) would introduce an unjustifiable cross subsidy (from broadcasters to telecommunication companies) that is contrary to the intent and purpose of the TDL (which has telecommunication companies funding public good telecommunication services that they benefit from); and
 - (c) would result in an unnecessary and avoidable double regulatory burden on broadcasters that is not intended by, or required to meet the purpose of, the Act (as amended).
17. The analysis by the High Court in the *REANNZ* case is directly relevant and should not be ignored. If that type of analysis is applied in assessing the impact of the Amendment Act on the TDL, then it should avoid the need for anyone to seek further redress from the High Court. Given the clear guidance that the High Court has provided in *REANNZ*, it would be disappointing if it was necessary for anyone to go to the time and expense of obtaining a further High Court judgement to get the right outcome.
18. In light of the submissions made, we look forward to the Commission concluding that:
- (a) no broadcasters are liable persons;
 - (b) broadcasting revenue falls outside the TDL regime; and
 - (c) consequently, broadcasters will not be required to participate in the TDL liability allocation process, thereby precluding broadcasters from a time consuming regulatory burden that does not apply to, and is not designed for, them.
19. That conclusion would be the right one, and would not be overturned by the High Court – since it would be consistent with the purpose of the Act, the facts, the Commission’s previous statements and position, and importantly, the guidance in the *REANNZ* decision.

Yours sincerely
SKY NETWORK TELEVISION LIMITED



Chris Major
Director of External Affairs

On receipt, this form becomes a Tax Invoice: GST No. 51-508-017

SECTION 1 - BROADCASTER INFORMATION

BROADCASTER NAME/NZBN NUMBER	STATION NAME(S)
ADDRESS	NAME OF CONTACT PERSON
TELEPHONE	EMAIL
TOTAL REVENUE \$	FINANCIAL YEAR ENDED/...../.....

SECTION 2 - BROADCASTER CERTIFICATION

The information provided in this levy return form is accurate and complete and provides a true and fair statement of total revenue:

SIGNED	COMPANY
NAME	DATE

**IF TOTAL REVENUE IS OVER \$500,000, YOU MUST CALCULATE REVENUE SUBJECT TO THE LEVY AMOUNT BY COMPLETING SECTION 3.
IF REVENUE SUBJECT TO THE LEVY IS OVER \$500,000, A LEVY IS PAYABLE.
WHETHER OR NOT A LEVY IS PAYABLE, YOU MUST EITHER ATTACH A COPY OF YOUR FINANCIAL STATEMENTS OR HAVE YOUR AUDITOR COMPLETE SECTION 5.**

SECTION 3 - LEVY PAYABLE

TOTAL REVENUE	A \$.....	Revenue is the total income as stated in your relevant financial statements.
Less TOTAL DEDUCTIONS (only available with an auditor's certificate, see Section 5 below)	B \$.....	To find B go to CALCULATING DEDUCTIONS (Section 4 below)
REVENUE SUBJECT TO LEVY	C \$.....	To calculate C use A-B=C If C is less than \$500,000, no levy is payable
LEVY PAYABLE	D \$.....	To calculate D multiply C by .00051
plus GST at 15%	E \$.....	
TOTAL AMOUNT PAYABLE	\$.....	To calculate use D+E= TOTAL AMOUNT PAYABLE

SECTION 4 - CALCULATING DEDUCTIONS – Auditor Certificate Required

Deduction (1)	\$.....	(1) Funding from government agencies which is provided for specific programme production and development (some categories of NZ On Air and some Te Māngai Pāho funding). This does not include general operations funding
Deduction (2)	\$.....	(2) Direct government funding for contestable allocation to programme production and development
Deduction (3)	\$.....	(3) Funding for, or revenue from, offshore broadcasting which is solely transmitted and received outside New Zealand (broadcasts cannot be received in New Zealand)
Deduction (4)	\$.....	(4) Revenue for or from non-broadcast activity (third party investments, programme sales, facilities hire, archives, merchandising, rent, tax, subvention, interest)
TOTAL DEDUCTIONS	\$.....	

SECTION 5 - AUDITOR'S CERTIFICATION – MUST BE COMPLETED BY INDEPENDENT AUDITOR IF DEDUCTIONS ARE CLAIMED OR IF FINANCIAL STATEMENTS ARE NOT PROVIDED

The above levy calculation represents a true and fair statement of total revenue derived from broadcasting in New Zealand for the financial year specified in the return. Deductions from total revenue are in accordance with the outlined definitions:

SIGNED BY AUDITOR	AUDITOR'S COMPANY
NAME OF AUDITOR	DATE

SECTION 6 - OFFICE USE ONLY

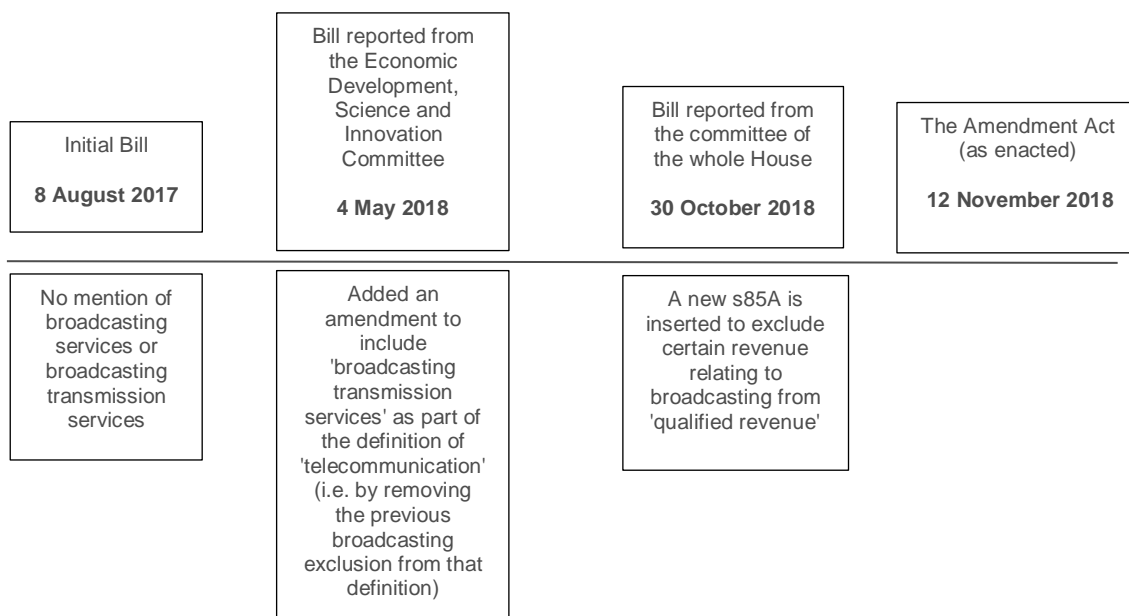
DATE RECEIVED	CHECKED BY	APPROVED
DATE INVOICE ISSUED	LEVY RECEIVED	

**SEND YOUR COMPLETED RETURN AND SUPPORTING INFORMATION TO BSA AT levies@bsa.govt.nz OR PO BOX 9213 WELLINGTON 6141
IF A LEVY IS PAYABLE PLEASE MAKE PAYMENT BY 31 JULY BY DIRECT CREDIT TO BROADCASTING STANDARDS AUTHORITY,
BANK OF NEW ZEALAND, WELLINGTON, ACCOUNT NUMBER: 02-1269-0019454-000**

Attachment B

Timeline

Treatment of broadcasting in the Telecommunications (New Regulatory Framework) Amendment Bill



Attachment C

Extracts that reference the change to the definition of "telecommunication"

Note: Yellow shading added for emphasis.

Final report of the Economic Development, Science and Innovation Committee on the Bill (4 May 2018)

The following extract is from the Commentary section of the report that explains the changes made.

"Part 1—Definition of "telecommunication"

Clause 4 would amend some of the definitions in section 5 of the Act. As introduced, it does not change the definition of "telecommunication" in the Act, which currently excludes broadcasting transmission services (except in subpart 2 of Part 4). We believe the current definition could lead to anomalies in the future because of the way technological change ("convergence") is breaking down the boundaries between providers of broadcasting and telecommunications services.

We recommend inserting clause 4(6) to replace the definition of "telecommunication" in section 5 of the Act with a new definition that includes broadcasting transmission services. We believe this would provide more consistency of treatment between different technologies. The new definition of "telecommunication" would not cover content and aggregation services.

We note that some entities may be required to contribute industry levies as a result of this change to the definition."

Supplementary Order Paper No 118 (16 October 2018)

The following extract is from the explanatory note to the SOP:

"The SOP inserts new clause 8A into the Bill, which inserts new section 85A. The amendment relates to the telecommunications development levy that is payable under subpart 2 of Part 3 of the Act. The amount of the levy is determined by reference to a liable person's qualified revenue. The amendment excludes from this revenue certain revenue derived from broadcasting services. The change is a consequence of a change made at select committee to include broadcasting within the definition of telecommunications."¹¹

¹¹ The statement in the SOP clearly overstates and misrepresents the scope of the change that has been made to the definition of "telecommunication". It is clear that "broadcasting" has not been included within the definition of "telecommunication" as explained in more detail in the Sky submission. The change to the definition of "telecommunications" was made at the Select Committee stage and the committee's description of the change is much narrower and more accurate (ie the change includes "broadcasting transmission services" within "telecommunication" but not "broadcasting" as a whole).